SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 5 | Issue

Article 15

January 1982

Introductory Comments

David Wooley

CURRENT REGULATORY FRAMEWORK

Introductory Comments

*by David Wooley**

This panel is asked to describe the current regulatory framework in which this difficult problem of acid rain is being addressed in Canada and the United States. This is not an easy task because the government policies are now in a period of development and are subject to abrupt changes. In addition, many would say that the current regulatory "framework" governing international and interstate air pollution has no frame and does not work. There is no frame or structure because the United States, over the past three years, has been reluctant to implement the relevant provisions of the 1977 Act, and because what little progress has been made, and even the Clean Air Act itself, appear to lie in jeopardy. It must be understood that any knowledge of today's regulatory policies may become dated tomorrow. Indeed, the court decisions, the legislation and the volumes of regulations may become mere historical curiosities by 1982. And, in the meantime, the arrival of a new administration, seemingly insensitive to the acid rain issue, makes the chances for vigorous enforcement and implementation of the interstate and international provisions of the Act uncertain at best.

The lack of enforcement and implementation are not new and have not been restricted to the new administration. The regulatory system has not worked because very little has been done to reduce the overall level of pollution loading, and to abate existing interstate and international air pollution problems. In fact, the trend over the past two years has been toward relaxation of pollution limits from major power plants in the United States.

I am not, however, a pessimist. I believe that we can develop a workable solution to the problem, but it will not come unless great public pressure is brought to bear on the U.S. Congress and the U.S. EPA to force changes in current policies. Success will depend heavily upon the willingness of the scientific community to come forward and be heard in Congress and in the courts on this issue. I predict that the governments of the Northeastern and mid-Atlantic states will play an increasingly im-

* Special Assistant Attorney General for the State of New York.

portant role in this issue, but that it will take the combined effect of international pressure and inter-regional political conflict to achieve the needed changes.

My introduction to the panel's topic will discuss the rare circumstances which place many States of the Union in active opposition to their own Federal Government on a significant international issue; and, of the circumstances which have brought an entire region of the United States into an identity of interest with a neighboring country on a common problem. This unique alignment will be fascinating to watch, since the controversy appears to be heating up and all sides are preparing for a long and fierce battle in the courts, in Congress and in the public eye.

It has long been recognized that interstate and international pollution can be a severe problem. In 1896, the question of international air pollution was raised under the Boundary Waters Treaty. The case concerned air pollution imported into the U.S. from the Trail Smelter in British Columbia. After 45 years of arbitration and study, a resolution of the matter occured in the 1940's.[1] The acid rain problem must be resolved more quickly in order to preserve vast areas of sensitive lands, and to prevent incalcuably high health damage. Regarding interstate air pollution, the U.S. Supreme Court decided a case in 1907 which established the common law powers of one state to sue for cross boundary air pollution.[2]

Until the 1970's, however, interboundary air disputes had involved relatively short range effects of air pollution. In recent years, as other speakers have mentioned, we have learned that significant quantities of air pollution can be transported long distances, often thousands of kilometers from the source, to cause damage in downwind areas.[3] The failure of the U.S. EPA and the U.S. Congress to address the long range problem led to a series of policies in the 1960's and the 1970's which have aggravated the acid rain problem.

The first of these involved the nearsighted concern for eliminating local pollution concentrations, which encouraged the construction of tall smokestacks at utility power plants. There is a substantial body of evidence which shows that utility plants in the Midwest are the major cause of the acid rain problem in Canada and the Northeast United States. It is also widely accepted that tall stacks at these plants encourage long range transport of the acid rain precursors. A recent EPA study reported that at least 167 smokestacks above 500 feet have been constructed at power plants in the United States since 1970. This occured in part because the 1970 Clean Air Act did not clearly prohibit use of tall stacks, but the tall stack construction continued even after federal court decisions which

1. *See* Trail Smelter Case (United States v. Canada), 3 R. Int'l Arb. Awards 1938 (1941), *reprinted in* 35 AM. J. INT'L L. 684 (1941).

2. Georgia v. Tennessee Copper Co., 206 U.S. 2230 (1907).

3. *See* NATIONAL COMMISSION ON AIR QUALITY, TO BREATHE CLEAN AIR 237 (1981).

found that air pollution dispersion techniques are not an acceptable method of complying with the Act.[4] In the 1977 Amendments, Congress endorsed the court decisions, and imposed a complex scheme designed to discourage tall stack growth.[5]

The EPA, however, has never implemented the regulations. This is disappointing because proper regulations could be used to force SO_2 emission reductions.

In June 1980, the EPA issued a decision in the rulemaking proceeding concerning emission limits for Cleveland plants. That decision included a new EPA policy on stack heights which had the effect of lowering the emissions for two large power plants. The EPA has recently, however, abandoned this interpretation of the Act. Under current policies, the EPA will allow stack height increases to justify relaxations of SO_2 emission limitations.[6]

There are other EPA policies which have served to aggravate the problem. The EPA has refused to implement the interstate pollution abatement provisions contained in sections 110(a)(2)(E) and 126. These sections, added to the Act in 1977, require the EPA to determine whether the overall emissions in one state are causing adverse air pollution conditions in another state. If impermissible interstate air pollution conditions exist, or would be caused by any proposed changes in emission controls, then the state or EPA must lower the emission limits in the source state and/or prohibit proposed emission increases.

In spite of these provisions, the EPA and its regional offices have stubbornly insisted on reviewing only short range impacts of proposed emission increases and have never reviewed the underlying state plans for overall compliance with section 110(a)(2)(E). This failure is particularly galling for States like New York and Pennsylvania, which have been unable to attain the national standards for total suspended particulates and sulphur dioxide. Despite well documented evidence that midwestern SO_2 emissions are a substantial cause of these nonattainment conditions, the EPA refuses to restrain major uncontrolled sources, and has recently approved large SO_2 emission limit relaxations in the midwestern states.

Another U.S. EPA policy which has significantly contributed to acid rain has been the refusal, despite frequent Congressional direction, to promulgate a fine particulate standard. As many in the audience will recognize, the fine particulates, generally known as sulfates and nitrates, are implicated as the primary contributors to precipitation in Canada and the Northeast.

The legislative history of the 1977 Act is instructive. The House re-

4. *See* H.R. REP. No. 95-294, 95th Cong., 1st Sess. 81-82, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1159-60.

5. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §123, 91 Stat. 721 (codified at 42 U.S.C. §7423 (Supp. III 1979).

6. *See* 46 Fed. Reg. 39,614 (1981).

port made the following comment on the EPA's failure to address the need:

> By 1973 . . . it had become widely recognized that fine particulates in the respirable range posed a substantially larger threat to health than larger gross particulates. Thus, in 1973 EPA witnesses testified that the Agency was moving toward control of fine particulates, that it does not have the authority to control fine particulates, and that schedules calling for control of fine particulates would result in action within a year or so.[7]

The House report also noted that no such action had been taken and the House committee referred to this as a broken promise.

These policies have all been reflected in the EPA's treatment of midwest state requests for relaxation of sulfur dioxide emission limits. In the past two years, the EPA has approved relaxations in the sulfur dioxide emission limits equivalent to 950,000 tons of SO_2 emissions per year. This informaton came as a great surprise to the northwest states and Canada, which were entitled to, but did not receive, notice of such agency actions.[8] The EPA did not inform Canada or the states and, to the contrary, was then promising the northeast states that something was about to be done to alleviate the interboundary air pollution problem.

I can think of no better statement than Doug Costle's speech to the acid rain conference with the states on the need to address the acid rain problem. He said:

> I am persuaded that the time has come to make the transition from research to action. My bottom line is to accomplish, in the near term, a real reduction in emissions from current levels. We must avoid, wherever possible, significant increases in emission which are causing the acid deposition to take place.[9]

"Hurrah," said the northeast states, but they were wrong to applaud. Costle continued the process of approving emission limit relaxations in the midwestern states.

The EPA is today continuing this process. There are currently 17 power plants in the midwest seeking relaxation of their SO_2 emission limits. If approved, these relaxations would increase allowable emissions by an additional 850,000 tons per year, and the EPA has already publicly proposed to approve emission limits for nearly half of that figure.[10]

These figures are for allowable and not actual emission increases, because many of the plants concerned had been burning coal with a sulfur

---

7. H.R. Rep. No. 95-294, 95th Cong., 1st Sess., reprinted in [1977] U.S. CODE CONG. & AD. NEWS

8. *See* 42 U.S.C. §7426(a)(1) (Supp. III 1979).

9. Address by Douglas Costle, Acid Rain: The Time to Act Is Now (remarks at the Acid Rain Conference with the States, Springfield, Va. Apr. 8, 1980) *reprinted in* 10 ENVIR. REP. (BNA) 2239 (1980) (on file at Case Western Reserve Journal of International Law office).

10. *See,* e.g., 46 Fed. Reg. 43,855 (1981).

content far above the existing limits. Nevertheless, some of the EPA actions go beyond merely legitimizing illegal emission rates. More importantly, however, is that these actions rob the Northeast of the opportunity to enforce those existing emission limits and bring about a reduction in total SO_2 loading.

This policy of nonenforcement of emission limits extends beyond the plants which have received emission limit relaxations. This enforcement failure has been documented by a report from the U.S. Comptroller General, which found that EPA enforcement actions, especially against major sources, had been largely ineffective, and many industrial and electric generating plants have remained out of compliance with emission limits for years.[11]

Other adverse EPA policies which affect the acid rain problem are: relaxation of the ozone standard, failure to implement controls on many types of ozone precursors such as V.O.C.'s from chemical plants, and failure to recognize the importance of controlling emissions of NOx.

To be fair, it is appropriate to note some EPA policies that have been positive. The EPA denied emission increases for one large power plant in southern Indiana. There has also been some significant progress in controlling steel plant emissions. The new source performance standards have been useful in reducing emissions from new power plants. Most of all, there's been some excellent research which was funded or performed by the EPA concerning long range transport.

Each of these positive changes ocurred during the Carter Administration and are about to be undercut by new Reagan Administration decisions. In particular, EPA has recently reversed the tall stack policy which Costle had applied to Cleveland Plants in an effort to reduce emissions.[12] Early in September, 1981, EPA proposed to approve an emission limit relaxation for a large Indiana power plant.[13] In July, EPA announced a proposal to deny relief in an interstate air pollution dispute (under section 126 of the Act) between Kentucky and Indiana, and that decision expresses positions which could foreclose any relief from EPA in longer range interstate air pollution disputes between Northeast and Midwest States.[14] The new administrator has publicly retreated from the former EPA position and states that nothing should be done about the acid rain and interstate air pollution problems until years more technical research is completed.

As a result of these policies, there are a number of pending court challenges to the EPA policies. Pennsylvania, New York, Massachusetts and the Northern Ohio Lung Association, are challenging the EPA deci-

---

11. *See* COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, IMPROVEMENTS NEEDED IN CONTROLLING MAJOR AIR POLLUTION SERVICES (1979).

12. 46 Fed. Reg. 39,614 (1981).

13. 46 Fed. Reg. 43,855 (1981).

14. 46 Fed. Reg. 38,937 (1981).

sion to allow a large relaxation of emission limits for two Cleveland area plants. The Ohio Lung Associations should be commended for years of activity on this case and for other efforts relating to sulphur dioxide and particulate emissions.

New York has filed three petitions in the United States Court of Appeals seeking reversal of emission limit relaxations in the states of Michigan, Illinois, and Ohio. In addition, the New York Attorney General has filed administrative petitions with the EPA seeking the disapproval of proposed emission increases for 17 other major Midwest power plants.

New York, Pennsylvania, Kentucky and Maine have each filed section 126 petitions with EPA seeking an abatement order from the agency against air pollution sources in upwind states. The EPA's failure to enforce SO_2 emission limits has resulted in several legal actions. The Sierra Club has filed suit against five power plants in Indiana under section 304 of the Act.[15]

The Province of Ontario filed petitions with the EPA requesting the Agency to deny the proposed relaxation of emission limitations for 17 power plants in six states. The Province cited numerous treaties and international law principles in support of its claim that the relaxation of emission limits is improper. Included among these are:

1. The international pollution section of the U.S. Clean Air Act;
2. The August 5, 1980, Memorandum of Intent signed by Canada and the U.S.;
3. The Great Lakes Water Quality Agreement of 1978;
4. The decision of the Arbital Tribunal in the Trail Smelter case;
5. Principle 21 of the 1972 Stockholm Declaration on the Human Environment (of which both U.S. and Canada are signatories);
6. The United Nations convention of November 13, 1979, on Long Range Transboundary Air Pollution.

This could set the stage for future litigation under section 115 of the Clean Air Act and possibly under international agreements.

A primary thrust of these legal proceedings is to force the EPA to recognize the impact of sulphur dioxide emissions on downwind concentrations of TSP. In Western New York, sulfates contribute as much as 18 percent of the annual TSP measurements, and we frequently have levels on a 24 hour basis between 30 and 50 micrograms. The Northeast States will seek to overturn recent EPA approval of emission limit relaxations by seeking a court declaration the EPA cannot approve changes in the state air plans unless it also assesses the impact that the action will have on downwind states. The Northeast States will also seek a court decision to force EPA to review and rewrite the state implementation plans of the Midwest States in order to determine the current level interstate pollution and to abate impermissible pollutant levels. EPA's mandatory

15. 42 U.S.C. §7604 (Supp. III 1979). *See* 46 Fed. Reg. 45,383 (1981).

duties under sections 110 and 126 provide the grounds for such remedies.

Each of these litigation strategies depends on the renewal of the Clean Air Act in its current form or in improved form. Although it is unlikely that Congress will weaken the Act with respect to the international and interstates pollution provisions, the determination of the Northeastern and mid-Atlantic States is so strong that even if the Clean Air Act is lost there will be an attempt to achieve a remedy under common law nuisance litigation. Although this litigation option is difficult, the desire and combined strength of the Northeast and mid-Atlantic states is undoubtedly strong enough to sustain such an effort.

No one expects, of course, that the problem of acid rain can be resolved solely through litigation. Litigation is slow and unreliable, and many of the provisions of Act are admittedly vague. The opposition of the Northeast States efforts will be strong and competent. Litigation is, at best, only one piece of the puzzle and when successful must be followed up by vigorous administrative advocacy during long implementation phases. The litigation must be pursued, but not at the expense of needed congressional lobbying and public debate.

Clearly, improvements in the Act could shorten the litigation or even make much of it unnecessary. New York would much prefer to litigate under a statute providing more direction to EPA.

One improvement which Congress could make in the Act would be to limit the current dependence upon air pollution dispersion modeling as a basis for interstate and international pollution abatement strategies. Since the ultimate objective is to reduce total loading of pollutants, it would be preferable for Congress to adapt a control technology approach. For example, Congress could mandate retrofitting of large power plants on a selected basis; or mandate regionwide coal washing; or energy dispatching schemes which minimize the use of older plants with high emission levels. Congress could improve section 110 and section 126 by specifically stating how EPA should implement regionwide abatement remedies to assure regional equity, and avoid long delays. Congress would greatly advance the abatement of interstate and international pollution if it would amend section 110 and section 126 to specifically define what level of interstate air pollution is impermissible under the Act, and to reaffirm EPA's duty to abate long range air pollution impacts such as acid rain. Congress should also specifically mandate the creation of a fine particulate standard which would control both the direct emission of fine particulates and the precursors of fine particulates such as sulphur dioxide and nitrogen dioxide. Above all, however, Congress must realize that the acid rain issue involves a need to reduce not only sulphur dioxide emissions but also emissions in nitrous oxides, ozone precursors and other pollutants critical to the formation of atmospheric sulfates. Continued progress in reducing auto emissions will be essential. More vigorous enforcement and implementation of ozone control strategies could be decisive. Finally, greater control must be achieved over nitrous oxide emissions from existing power plants.